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February 13, 2012

Via E-Filing

Rachel D. Campbell
Director
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

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Public Record**

RE: Docket No. NOR 42129, *American Chemistry Council et al. v. Alabama Gulf Coast Railway and RailAmerica, Inc.*

Dear Director Campbell:

We are writing on behalf of Complainants in the above-referenced docket concerning the Motion for Injunctive Relief that has been pending decision for ten months. The purpose of injunctive relief is to prevent irreparable harm to a party while a case is pending. In this proceeding, Complainants have requested an injunction against Defendants' requirement that TIH materials be transported in special train service. On January 17, 2012, Defendants submitted opening evidence and argument in a related proceeding, Docket No. FD 35517, CF Industries, Inc. v. Indiana & Ohio Ry, Point Comfort and Northern Ry., and The Michigan Shore R.R.—Petition for Declaratory Order, that exacerbates the potential for irreparable harm if the Board does not promptly enjoin their special train service requirement.¹

Rather than assess a line-haul rate for normal train service and a surcharge for the additional special train services, Defendants have published single factor, all-inclusive tariff rates. By not using the term "surcharge" in their tariffs and by publishing a single all-inclusive rate, Defendants are attempting through semantic games to avoid the Board's holding in Ex Parte No. 661, Rail Fuel Surcharges (served Aug. 3, 2006). In that decision, the Board affirmed its unreasonable practice jurisdiction to review railroad fuel surcharges against railroad arguments that such a challenge fell only within the purview of the Board's unreasonable rate jurisdiction, which first requires shippers to prove market dominance:

Here, however, we are not proposing to limit the total amount that a carrier can charge, through a combination of base rates and surcharges, for providing rail transportation. Rather, we are only

¹ In a consolidated decision, served Sept. 30, 2011, in both dockets, the Board adopted a consolidated procedural schedule to allow a single record to be developed in both proceedings. In that same decision, the Board also directed the parties in Docket No. 42129 to file supplemental information regarding the Motion for Injunctive Relief, which was completed on October 31, 2011.

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addressing what we believe is an unreasonable practice of applying what the railroads label a fuel surcharge in a manner that is not limited to recouping increased fuel costs that are not reflected in the base rate. The measures we are proposing are designed to preclude such an unreasonable practice.

Id., slip op. at 4. By avoiding the term "surcharge" in their tariffs and publishing single factor, all-inclusive rates, Defendants seek to distinguish their special train requirement from this STB holding.

The significance of this distinction is evidenced at pages 23-24 of Defendants' Opening Evidence, filed January 17, 2012, wherein they claim that Complainants must file a rate reasonableness complaint to the extent that that they object to the rate levels charged for special trains. Thus, even if Complainants ultimately persuade the Board that the special train requirement is an unreasonable practice, the Defendants may attempt to avoid refunding the excess charges on the grounds that Complainants must file a rate reasonableness complaint. Although Complainants vigorously contest that position, the outcome is not assured. Therefore, the longer the Complainants must continue to pay for special train service that the Board may ultimately determine to be unreasonable, the greater their irreparable harm if they are unable to recover their overpayments.

The position taken by Defendants in their opening evidence reinforces the need for a decision on Complainants' Motion for Injunctive Relief. Therefore, Complainants write to express the urgency of their request for injunctive relief and ask the Board to decide their motion without further delay.

Sincerely,



Jeffrey O. Moreno
Paul A. Donovan
Counsel for Complainants

Cc: Louis E. Gitomer, *Counsel for Defendants*